

An Innovative Approach to Permanent State Funding of Civil Legal Services: One State's Experience—So Far

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In October 1997 the Chief Judge of the State of New York, Judith S. Kaye, appointed a Legal Services Project and charged its members with finding a means of “promot[ing] constancy in the flow of resources for professional legal services organizations so that they may continue their excellent work and serve greater numbers of litigants.”¹ At the time of announcing the project, Chief Judge Kaye stated: “A justice system that allows disparities in justice based on the ability to pay is inconsistent with a fundamental principle of our free democratic society – equal justice for all.” The Project therefore viewed its mandate as identifying a potential source of permanent state funding for civil legal services programs – one that would be “substantial, stable from year to year, and secure (that is, permanent).”²

The Legal Services Project issued its *Report* to the Chief Judge, entitled “Funding Civil Legal Services for the Poor,” in May 1998. The Report “concluded that only one potential funding source meets the criteria of substantiality, permanence, constancy and fairness: abandoned (unclaimed) property.” It therefore recommended the annual transfer of \$40 million from the Abandoned Property Fund to a newly created Access to Justice Fund.³ The story of how the Project reached its conclusion follows.

The genesis of the creation of this special Project was twofold. The Chief Judge of the State had a longstanding interest in and commitment to civil legal services for the poor. A coalition of civil legal service providers, including union and management attorneys, upstate and New

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1. Chief Judge Kaye announced the appointment of the Legal Services Project on October 7, 1997, at the opening of the New York City Legal Aid Society's new offices in Manhattan. *Uniform Court System Release*, Oct. 7, 1997.

2. LEGAL SERVICES PROJECT, *FUNDING CIVIL LEGAL SERVICES FOR THE POOR* 11 (1998) [hereinafter *REPORT*].

3. *See id.* at 11.

York City program attorneys, and attorneys from programs that received Legal Services Corporation funds and those that had relinquished LSC funds after the 1996 Congressional restrictions, met from time to time with the Chief Judge to urge the need for a permanent source of state funding. In addition, in September 1997 the New York State Assembly Judiciary Committee introduced a proposal, entitled the "Judicial Reform, Integrity and Access to Justice Act," to provide \$40 million annually for civil legal services for poor New Yorkers. Assembly member and Judiciary Committee Chair Helene Weinstein introduced the Act, which combined funding for civil legal services with proposals to merge the state's numerous trial courts and to create a fifth judicial department. The Assembly asked the Office of Court Administration to identify an appropriate funding source.

Michael A. Cooper, a partner in the New York City firm of Sullivan & Cromwell, chaired the Legal Services Project.⁴ The Project's membership was distinct from other court-appointed task forces in that it included senior corporate counsel, business leaders, and executives from the financial services sector all over the state, in addition to leaders of the private bar. Only two members were employed by a legal services program. Among the Project's twenty-one members were Lewis Golub, Chairman and Chief Executive Officer of the Golub Corporation, parent company of Price Chopper Supermarkets, from Schenectady, New York, and Edward Reinfurt, Vice President of the Business Council of New York State, from Albany. These two business leaders had no previous involvement with or exposure to civil legal services programs. They asked penetrating questions. They brought a private-industry perspective to the Project, emphasizing the need to collect and analyze concrete data. They assisted in shaping the direction of the Project's *Report* and became ardent supporters of the Project's recommendations.

The Project began by educating itself on the unmet need of civil legal services for poor New Yorkers. In the beginning of this decade, the New York State Bar Association had commissioned a study entitled *The New York Legal Need Study 1990*. It found that less than fifteen percent of the poor in the state who had civil legal problems had access to a lawyer.⁵ A 1993 study in New York City documented that nine out of ten low-income tenants in Housing Court in New York City did not have legal

4. Mr. Cooper subsequently was elected President of the Association of the Bar of the City of New York, and the Chief Judge chose to release the Project's *Report* at his inauguration as President at the House of the Association on May 19, 1998.

5. See NEW YORK STATE BAR ASSOCIATION, *THE NEW YORK LEGAL NEED STUDY 1990* (revised 1993). To be eligible for assistance from a legal services program, an individual's or family's annual income cannot be higher than 125% of the federal poverty level (\$9862 for an individual; \$16,662 for a family of three).

representation because of the lack of available civil legal services, and that those who did have counsel won in ninety percent of their cases.⁶

Federal funding from the Legal Services Corporation for New York civil legal services programs dropped from \$25.5 million in 1992 to nearly \$17 million in 1998. In addition, the second major source of funding for civil legal services in New York State, the proceeds of the State Interest on Lawyers' Accounts (IOLA) program, dropped from \$29 million in 1992 to approximately \$10 million in 1998 because of declining bank interest rates and bank fees for lawyer's escrow accounts.⁷ The Project found that in 1998 "those two sources will generate almost \$40 million less than they did in 1992, on an inflation-adjusted basis."⁸ That explanation formed the basis for the \$40 million permanent funding goal.

As a result of the reduced funding from the early part of the decade to 1998, legal services offices throughout the State have closed or consolidated, intake has been severely limited, and the number of legal services staff has been reduced.⁹ This shrinkage, coupled with the dramatic changes in welfare, housing, and immigration laws,¹⁰ which created a profound impact on the need of poor people for assistance and representation, convinced the Project that the unmet civil legal needs of the poor had grown, and that only a fraction of the need was being met. In addition, the number of poor people is increasing as their poverty deepens.¹¹

6. See SEPTEMBER JARETT & MICHAEL MCKEE, HOUSING COURT, EVICTIONS AND HOMELESSNESS: THE COST AND BENEFITS OF ESTABLISHING A RIGHT TO COUNSEL 8 (1993).

7. On June 15, 1998, the U.S. Supreme Court issued its decision in *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998), a constitutional challenge to the Texas IOLTA program. The 5-4 majority held that the "interest income generated by funds held in IOLTA accounts is the 'private property' of the owner of the principal." *Id.* at 1934. The Court remanded the case to the U.S. Court of Appeals for the Fifth Circuit to determine whether the IOLTA funds have been "taken" by the State in violation of the Fifth Amendment to the U.S. Constitution and as to the amount of just compensation, if any, due respondents. *Id.* The decision clearly underscores the vulnerability of IOLA funding and the need for a permanent source of funding. See Linda Greenhouse, *\$100 Million in Legal Services Funding Is Placed in Doubt by a Supreme Court Ruling*, N.Y. TIMES, June 16, 1998, at A18; *High Court Decision Seen Imperiling IOLA Accounts*, N.Y. L.J., June 16, 1998, at 1. However, it is also apparent that had there been five votes ready to determine there was an unconstitutional "taking," the majority would have actually decided the entire case rather than only provide an answer limited to the private property question and remand the rest.

The Project stated in its Report that, should the Supreme Court fail to reject the challenge and put in jeopardy the \$10 million expected from New York's IOLA program, the Project would amend its recommendations to call for a transfer of \$50 million rather than \$40 million from the Abandoned Property Fund. See REPORT, *supra* note 2, at 11-12 n.14.

8. REPORT, *supra* note 2, at 4-5.

9. The Report cited specific examples reported by legal services providers. See *id.* at 5-6.

10. The Report noted that public benefit programs have been completely revised by federal, state, and local changes in laws, regulations, and policies, and the New York State Rent Regulation Reform Act of 1997 amended a number of housing laws. See *id.* at 4 n.6.

11. The Report noted that from 1990 to 1995 the number of poor New Yorkers living below 125% of the poverty level increased from 3.4 million to 3.9 million. See *id.* at 4 n.5 (citing

The Project *Report* stated:

So far as we can determine, there has been no recent, comprehensive, controlled statistical study that has estimated how much additional money would be required to address all the unmet needs of New York's poor for civil legal services. It seems certain, however, that the \$40 million . . . would address only a part—perhaps a small part—of the aggregate need, for even at the higher funding levels in 1992, only 15% of the poor's legal needs were receiving a lawyer's attention, . . . and the number of poor persons is much larger today than it was in 1992¹²

The members of the Project, however, were convinced that simply demonstrating the need for lawyers to represent poor people who have meritorious civil legal problems, and supporting the provision of lawyers, would not result in support for permanent state funding of \$40 million. The case had to be made that providing legal services was cost-effective for the state. So the Project embarked on a review and analysis of specific services provided by legal services attorneys. These included eviction prevention programs designed to represent families in danger of eviction and thereby avert shelter costs; disability advocacy programs that represent applicants for federal social security disability benefits and thereby reduce public assistance costs; family preservation efforts in the domestic relations arena that prevent foster care costs; and the state and city reports that documented the substantial savings to the taxpayers of these efforts.¹³ The Project concluded that "the funding of legal services programs is highly cost-effective and results in the savings of significant State funds. In many instances, the savings to the State outweigh the costs of providing counsel several times over."¹⁴ In addition to money saved by

UNITED WAY OF NEW YORK CITY, LOW INCOME POPULATIONS IN NEW YORK CITY: ECONOMIC TRENDS AND SOCIAL WELFARE PROGRAMS 1997 at 12 tbl.3 and COMMUNITY SERVICE SOCIETY OF NEW YORK, POVERTY IN NEW YORK CITY 1996 7-9 (1997)).

12. REPORT, *supra* note 2, at 6-7.

13. The *Report* specifically cited the following reports. A 1990 report of the New York City Department of Social Services concluded after evaluating a prototype eviction prevention program that the provision of lawyers resulted in the saving of approximately \$4 for every \$1 of cost. See NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES, THE HOMELESSNESS PREVENTION PROGRAM: OUTCOMES AND EFFECTIVENESS 2 (1990). The New York City Department of Homeless Services data suggest it costs \$30,000 to keep a family in the shelter system, where the average length of stay is ten months.

A February 1997 Report to the Legislature by the New York State Department of Social Services on the Disability Advocacy Program 1984-1997 reported net savings of \$13.7 million. See New York State Department of Social Services, DISABILITY ADVOCACY PROGRAM 1984-1997, at 6 (1997). The Project *Report* actually inaccurately reported that the netted savings was \$7.95 million. It inadvertently had subtracted the \$5.74 million cost of funding counsel from a number that had already been reduced by that amount. See REPORT, *supra* note 2, at 8.

According to Child Welfare Watch, a joint project of the Center for an Urban Future and the New York Forum, the average cost of foster care per child in 1997 was \$13,070 per year, and the average length of stay in the foster care system was 4.28 years, resulting in a potential savings of \$55,940 per child for whom a placement is prevented. See 3 CHILD WELFARE WATCH, Spring-Summer 1998, at 15.

14. REPORT, *supra* note 2, at 7.

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reducing homelessness and the need for income support and social services, the Report also recognized that the State, by providing funding for civil legal representation of the poor, would achieve greater stability by giving low-income communities the means to air and resolve legitimate grievances through the judicial system.

Convinced of the great and worsening unmet need, the cost-effectiveness of providing civil legal services, and the justification of the \$40 million figure, the Project turned to exploring alternatives for funding legal services attempted in New York and other states. It reviewed existing studies, surveys, and reports.¹⁵ Information and views were solicited from legal services providers and bar associations throughout the state. Twenty-seven legal services providers and twenty-four bar associations responded to the Project's inquiries.¹⁶ In addition, the Chief Administrative Judge of the State met with the Project to share the views of the Office of Court Administration.

The criteria the Project determined should be applied to potential funding sources were "substantiality, permanence, constancy, and fairness."¹⁷ With regard to fairness, members of the Project felt strongly that the Project should identify funding sources "that are the least controversial, or 'fairest,' in the sense that no segment of the public has a greater claim to the funds than any other group and no one group should legitimately feel unjustly saddled with an expense that should be borne more broadly."¹⁸ Only one potential funding source—abandoned (unclaimed) property—met all the criteria.¹⁹

The Project proposed that New York create an Access to Justice Fund to be funded by the State through a dedicated revenue stream of \$40 million from the State Abandoned Property Fund. Under the existing Abandoned Property Law, various categories of tangible and intangible

15. Among the most helpful were the American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID) Project to Expand Resources for Legal Services (PERLS) and the State Planning Assistance Network (SPAN), a partnership of the ABA and the National Legal Aid and Defender Association. A New York State legal services community coalition had also prepared a very useful briefing book for the Project. A selective list of sources reviewed by the Project are included in Appendix B of the *Report*.

16. See *REPORT*, *supra* note 2, at App. C (listing the responding entities).

17. *Id.* at 11.

18. *Id.*

19. The other potential revenue sources considered but not recommended included: filing fee increases for all courts of general and limited jurisdiction, acceleration of payment of filing fees, imposition of a fee on entry of a judgment, allocation of a portion of punitive damage awards, interest on broker accounts, acceleration of attorney registration fees, allocation of a portion of pre- and post-judgment interest, unclaimed class action proceeds, income earned on tenant security deposits, and interest of justice court funds. A full discussion of each of these alternatives and the reasons for not recommending them are included in Appendix D of the *Report*. For example, some possibilities, such as civil class action settlements and punitive damage awards, were considered neither substantial nor secure.

personal property that remain unclaimed for specified periods of time (referred to as "dormancy periods") escheat to the State of New York. Because such claims are not subject to a statute of limitations, the owners of escheated property may lay claim to the property at any time. However, the experience in New York is that asserted owners later claim a relatively small portion. Statistics from the Office of Unclaimed Funds, which is part of the Office of the State Comptroller, revealed that receipts from all abandoned property sources—including property turned over by reporting entities such as banks and brokerage firms, proceeds from sales of securities and audit collections of cash—are both substantial and stable from year to year. Amounts refunded or returned to owners are much smaller, but exhibit a similar stability. For the past three years, the Fund's receipts have exceeded refunds to property owners by an average of \$231 million a year.²⁰

New York's Abandoned Property Law was enacted in 1943 and although various sections have been amended from time to time, it has never undergone a comprehensive review and its overall structure remains unchanged. In the intervening years, the National Conference of Commissioners on Uniform State Law has approved and amended a uniform law governing unclaimed property. The 1981 statute has been enacted in eighteen states and the 1995 revised act has been adopted in five additional states.²¹

Key to the Project's proposal is its recommendation to amend the New York Abandoned Property Law in four major areas, which should have the result of producing substantial additional funds that would escheat each year and would wholly or partly offset funds allocated to legal services. The recommendations are: (1) to include categories of property interests not now covered that are covered by the Uniform Law;²² (2) to define "miscellaneous" unclaimed property more inclusively and make it subject to mandatory, rather than permissive, escheat; (3) to shorten the dormancy periods to conform to the 1995 Uniform Law's shorter periods

20. The reported amounts for 1996-97 were \$291 million in abandoned property receipts, \$65 million abandoned property refunded; 1995-96, \$299 million received, \$60 million refunded; 1994-95, \$287 million received, \$58 million refunded. According to the New York statutory scheme, at the end of any month if there is more than \$6 million in the Abandoned Property Fund or an amount the Comptroller determines is necessary to satisfy claims during the following month, the Comptroller is required to pay the excess to the credit of the General Fund. At the end of the fiscal year, moneys in the Abandoned Property Fund cannot exceed \$750,000. *See id.* at 13.

21. *See* REPORT, *supra* note 2, at 13.

22. These would include unmatured debt instruments issued by a business or financial institution; contract obligations, such as bonus payment obligations and royalties, that are not evidenced by a check; property held by state government agencies; and unclaimed property distributable by a business organization in the course of dissolution (other than a bank or insurance company). *See id.* at 14.

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for comparable property;²³ and (4) to strengthen the enforcement provisions of the Abandoned Property Law by increasing the penalties. The Project also recommended that legislative hearings be held to determine the fairness, feasibility, and effect of further shortening the dormancy periods.

While the Project recognized that it is very difficult to estimate the exact amount of increase the proposed amendments would generate, the *Report* stated that “even a 20% increase over the 1996-97 net of \$226 million would more than cover our recommended \$40 million allocation to the Access to Justice Fund.”²⁴ In the event it did not, the *Report* stated the difference should be made up from the Abandoned Property Fund. The Project also recognized that drawing upon the Abandoned Property Fund could be viewed as an indirect draw upon the General Fund. Nonetheless, the *Report* asserted: “But even so viewed, the proposal is appropriate, for the provision of civil legal services for poor people is widely—and rightly—viewed as a societal, and therefore State, responsibility.”²⁵

As Michael Cooper indicated in the *Report’s* Executive Summary, the Project members, including the businessmen and investment bankers, quite remarkably were “unanimous in the view that the provision of civil legal services for poor persons is a fundamental obligation of government which should, if necessary, be satisfied through allocation of general State revenues.” Members of the Project were also unanimous “in believing that the Abandoned Property Fund, both as presently constituted and as augmented by amendments we propose to the New York Abandoned Property Law, is the fairest and surest, if only partial, solution to this problem.”²⁶

The Project also felt that the existing IOLA Board of Trustees should administer the funds, with “a recognition that the lion’s share of new

23. The specific periods referred to would be for amounts held by the Superintendent of Banks after liquidation of a banking organization, from four years to one year; wages owed by a corporation to a New York resident, from four years to one year; moneys paid into court that are in the hands of county treasurers or city finance commissioners, such as estate funds or veteran’s benefits, from five years to one year; property held by the Superintendent of Insurance after insurance companies’ liquidation proceedings, from five years to one year; unclaimed property paid into federal courts, from ten years to one year; and gift certificates from five years to three years. *See id.* at 15.

24. *Id.* at 16.

25. *Id.* at 16-17. The Project went on to suggest funding contingencies. If the Abandoned Property Fund proved inadequate, the General Fund should provide the balance, at least to the extent of the surplus in the Court Facilities Incentive Aid Fund (CFIA). If all else fails, a divided Project recommended, and only as a last resort, discrete increases in certain fees paid by litigants and lawyers: a new \$25 motion fee in Supreme Court, a \$15 increase in Housing Court filing fees, and an increase of \$50 in the biennial attorney registration fee. *See id.* at 17-21.

26. Letter from Michael A. Cooper, Chair, Legal Services Project, to Chief Judge Judith S. Kaye, New York Court of Appeals (Mar. 26, 1998) (on file with author).

funding for legal services should be given to direct providers.”²⁷ In recognizing that it necessarily will take time for its recommendations to generate new funds, the Report poignantly noted: “All the while, hundreds of thousands of poor people will go unrepresented in addressing such critical legal needs as housing and disability. A civilized society cannot permit that state of affairs to continue.”²⁸

Unfortunately, Albany did not, in the end, heed that call to action before adjourning in June 1998. The New York state legislature for the past five years has appropriated discretionary funds for civil legal services programs as an emergency “add on” at the end of the legislative session, which Governors Mario Cuomo and George Pataki have approved. The appropriated funds have been dispensed to the Department of State, which in turn distributes the funds to thirty-one individual programs based on a formula determined by the Legislature. This year, the State Assembly and the Senate appropriated \$6.8 million statewide for civil legal services programs. Adjusted for inflation, the amount is basically the same as the year before. However, Governor Pataki’s broad veto of portions of the budget in April 1998 included all of this funding for civil legal services for the poor.²⁹ The *Report* notes: “That veto graphically underscores the need to find a permanent and secure source of funding for legal services.”³⁰ Chief Judge Kaye, in releasing the Project’s report, stated that “the principle of equal justice for all needs a well-functioning system of civil legal services. That means a stable and secure system of funding for legal services, one that is removed from the vagaries of the political arena and year-to-year appropriations.” She continued, “if we ultimately want to get out of the cycle of annual crises in legal services, we need to take a longer view both of the problem and of avenues of solution.”³¹

The Project members always expected that the changes it recommended would have to be accomplished during the next legislative session. Members had hoped, however, that some funds would be allocated to “jump start” the process this year—so that while a cure was being developed, the patient would not be left to die. Unfortunately, the legislative session ended on June 19, 1998 without any restoration of the vetoed

27. REPORT, *supra* note 2, at 22.

28. *Id.* at 21.

29. The Governor did not single out legal services. Indeed, these funds at varying levels have been included in the state budget that the Governors have signed every year since 1993. Aimed at making up some of the dramatic losses suffered by legal services programs in recent years, including the 50 percent cut of federal funds in New York State since 1992 and the decline of more than half of the funds from the IOLA fund since 1992, these funds have become a critical part of every program’s budget.

30. REPORT, *supra* note 2, at 5.

31. Judith S. Kaye, Address at the Association of the Bar of the City of New York (May 19, 1998) (transcript on file with the author).

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\$6.8 million civil legal services funding, even though an Assembly bill had been introduced in the waning hours to restore the funding for this year.³²

With regard to the prognosis for a future adoption of permanent state funding, the Project intends to press forward vigorously by drafting proposed legislation to implement its recommendations with input from the State Comptroller—whose aegis includes the Office of Unclaimed Funds, which oversees the administration of the Abandoned Property Fund—and by urging its business and corporate-sector leaders to intercede with both houses of the Legislature and the Governor. The Project hopes to garner widespread support for its recommendations, and to take advantage of the active leadership of the Chief Judge of New York.³³ This action plan, coupled with the initial favorable reaction in Albany to the Project's recommendations, may make increased funding for civil legal services a reality.³⁴ Certainly the lessons learned to date have shown the urgent need for a permanent source of adequate funding that it is not subject to political vagaries, particularly in an election year, as was demonstrated with excruciating pain this year. The goal of seeking some semblance of equal access to justice for poor New Yorkers should be removed from the political currents and jockeying that take place in the political arena.

The most appropriate words to conclude with, as our Chief Judge reminded us in releasing the Project's Report, are those of Learned Hand: "It is the daily; it is the small; it is the cumulative injuries of little people that we are here to protect If we are to keep our democracy, there must be one commandment: THOU SHALT NOT RATION JUSTICE."³⁵

32. On June 15, 1998, the Assembly introduced Assembly Bill 11,350 to restore the \$6.8 million funding for civil legal services. On the previous Friday, June 12, 1998, the Assembly had introduced Assembly Bill 11,271, which included an amendment to the State Finance Law by adding a new section (97-sss) to create a New York Access to Justice Fund in the custody of the state comptroller and to require transfer of \$40 million from the State Abandoned Property Fund to it.

33. Copies of the *Report of the Legal Services Project* can be obtained by writing to Attention: Antonio Galvao, New York State Office of Court Administration, 25 Beaver Street, 11th floor, New York, New York, 10004.

34. The New York State Bar Association, at its meeting on June 27, 1998, adopted a resolution approved by its House of Delegates which endorsed the core recommendation of the Legal Services Project and called upon lawmakers to provide \$40 million a year from the Abandoned Property Fund. Since then, the Association of the Bar of the City of New York and the Network of Bar Leaders have adopted similar resolutions in support of the Project's recommendations.

35. Learned Hand, Address at the Seventy-Fifth Anniversary Celebration of The Legal Aid Society of New York City (Feb. 16, 1951).

